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No. 85-1961 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE LESLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court, before this Court's decision in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), should have required the prosecutor to explain his reasons for striking black veniremen from the jury panel.

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OPINIONS BELOW

The majority and dissenting opinions of the en banc court of appeals (Pet. App. B1-B62) are reported at 783 F.2d 541. The majority and dissenting opinions of the panel of the court of appeals (Pet. App. A1-A44) are reported at 759 F.2d 366.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1986. The petition for a writ of certiorari was filed on April 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of possession of cocaine with intent to distribute it, in

violation of 21 U.S.C. 841(a)(1), and of conspiracy to commit that offense, in violation of 21 U.S.C. 846. Petitioner was sentenced to eight years' imprisonment and fined $25,000 on each count, the sentences to run concurrently. A panel of the court of appeals reversed, but the en banc court of appeals affirmed by a vote of 11 to 5.

1. The evidence at trial showed that Claude Griffin and Fernando Lopez were partners in a narcotics business in New Orleans. Griffin was an operator of an air conditioning and heating shop. 2 R. 160, 194-195. In 1982, Griffin and Lopez bought cocaine in amounts varying from two to four kilograms from a distributor in Houston, Texas, through Fernando Giron (2 R. 161-163, 179, 195). They used Thomas Paul Gray as a runner to deliver money and pick up the cocaine (2 R. 88-97, 166-167; 3 R. 359-361).

Griffin sold approximately 20 to 25 kilograms of the cocaine secured through Giron and other sources to petitioner for $1800 to $2000 an ounce (2 R. 165), employing code words for cocaine in their telephone conversations (2 R. 171-188; GX 1-12). Petitioner also gave Gray between $20,000 and $25,000, which Gray used to obtain cocaine from Giron (2 R. 99-100, 169). In February 1982, after Griffin introduced Giron to petitioner, Giron delivered two kilograms of cocaine to petitioner for $106,000 (2 R. 170; 3 R. 403-405).

2. The voir dire questioning of prospective jurors at petitioner's trial is summarized in the opinion of the en banc court (Pet. App. B5-B6). During the voir dire examination, the district court excused veniremen for cause. Thereafter the parties exercised their peremptory challenges. The prosecutor removed six black persons from the jury venire. Petitioner, who is black, and his codefendant, who is white, struck ten white persons. The prosecutor also removed one black person from the panel of four called to sit as alternate jurors. *Id.* at B5-B6.

Petitioner requested a mistrial on the ground that the prosecutor had exercised his peremptory challenges exclusively against blacks and that the prosecutor's exercise of his peremptory challenges had removed all the blacks from the jury venire and the only black person from the panel of alternates. The prosecutor responded that he had not exercised his challenges on the basis of race. Although the prosecutor stated that he did not have to give a reason for his use of strikes, he offered to explain his reasons in camera (Pet. App. B6).

Petitioner contended that the district court could act even though this Court in *Swain* v. *Alabama*, 380 U.S. 202 (1965), had ruled that it was permissible in an individual case for the prosecution to strike all the blacks from the venire. Petitioner also argued that he was a black man with a good reputation in the black community and that "there is no way to communicate through peers in the community" without a single black on the jury. The district court rejected these arguments, and the trial proceeded (2 R. 4-7; see also 1 R. 186-189).

3. On appeal, a divided panel of the court of appeals reversed (Pet. App. A1-A17). The majority invoked the court's supervisory power to regulate the federal prosecutor's use of peremptory challenges. Noting that the district court had not accepted the prosecutor's offer to explain his strikes, the court of appeals remanded the case for a hearing to determine whether the prosecutor had exercised his challenges for impermissible, racially discriminatory reasons.

On rehearing, the en banc court of appeals affirmed the conviction. The 11-judge majority framed the issue as "whether the prosecution may take race or similar group characteristics into account when it exercises a peremptory challenge for the sole purpose of procuring a jury least likely to be partial to the defense, in light of the discrete facts of

now before the Court in *Brown* v. *United States*, cert. granted, No. 85-5731 (June 2, 1986). Accordingly, it is appropriate to hold this petition pending a decision in *Brown*. If *Batson* is determined not to be retroactive, the petition should then be denied.

If *Batson* is determined to be retroactive, the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration. The court of appeals should determine on remand whether petitioner adequately preserved a constitutional claim (see note 1, *supra*) and, if not, whether *Batson* affects the analysis of the federal courts' supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Brown* v. *United States*, No. 85-5731.

Respectfully submitted.

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